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No.

In the Supreme Court

of the

United States

October Term, 1982

Mary Hunter and Arthur Hunter,
Petitioners,

vs.

Agnes Maxie,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTION PRESENTED

Does the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) apply to private family adoption proceedings or is its applicability restricted to non-family public and private agency actions and proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

The petitioners Mary Hunter and Arthur Hunter respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alaska entered in this proceeding.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Alaska (App. A, infra.,

A-1-A-14) is reported at 651 P.2d 1170 (Alaska 1982). The decree of the Superior Court of Alaska, Fourth Judicial District is not in written form and is therefore not reported.

JURISDICTION

The judgment and opinion of the Supreme Court of Alaska (App. A, infra., A-A-1-A-14) was rendered on September 20, 1982. A petition for rehearing was denied on November 9, 1982 (App. B, infra., A-14). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

25 U.S.C. § 1901(4) provides:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds-- . . .
>
> (4) that an alarmingly high percen-

tage of the Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and . . .

25 U.S.C. § 1902 provides:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistances to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1903(1)(iv) provides:

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

25 U.S.C. § 1912(d)(f) provides:

Remedial services and rehabilitative programs; preventive measures

(d) Any party seeking to effect a foster care placement of, or termination

of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

Parental rights termination orders; evidence; determination of damage to child

(f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1916(a) provides:

(a) Notwithstanding State law to the contrary, whenever a final decree of adop-

tion of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

STATEMENT OF THE CASE

On February 16, 1980, a baby girl was born to Agnes Maxie in Anchorage, Alaska. (R. 5) Agnes Maxie is a Native Alaskan Eskimo from Bethel, Alaska. (Tr. 170, R. 47) The child went to live with the adoptive parents February 21, 1980. (Tr. 22, R. 1) On February 22, 1980, Agnes Maxie signed a consent to the adoption of

her new baby by her Eskimo sister and Indian Brother-in-law, Mary Hunter and Arthur Hunter. (R. 4) The proposed adoption had been suggested by the natural mother well before the birth (Tr. 22), in part because Agnes Maxie felt she was not then living the type of life that would be good for a baby and in part because her sister wanted a little girl. (Tr. 173, 171)

On April 9, 1980, Agnes Maxie signed a second Consent to Adoption (R. 6) and a Relinquishment of Parental Rights (R. 9) in the presence of Probate Master Brown in Anchorage, Alaska. A Decree of Termination of Parental Rights based on the relinquishment was entered April 23, 1980. The hearing on the Hunter's petition for adoption took place August 7, 1980, and the decree was signed September 5, 1980. This hearing took place in the Superior Court of the State of Alaska at Fairbanks, Alaska.

In early November 1980 the State of Alaska, Department of Health and Social Services, Division of Family and Youth Services, became aware of this adoption. A check of the adoption file revealed that no notice of the adoption had been given to the Department of Health and Social Services as required by law. (R. 17) On January 30, 1981, Judge Hodges ordered the adoption proceeding reopened and the decree vacated, pending an investigation by the Department of Health and Social Services of both homes. (R. 21, 61)

Agnes Maxie filed an affidavit asserting her interest in having the child returned to her if the court decided to deny the adoption and giving notice of her intention to request a hearing on the best interests of the minor on January 23, 1981. (R. 22) Agnes Maxie's Petition for Return of Custody of Child Pursuant

to the Indian Child Welfare Act was filed February 10, 1981 (R. 23), with the Motion for Hearing filed on March 18, 1981. (R. 25) The Department's adoption study was filed March 27, 1981, and supplemented June 11 and 19. (R. 37-52)

Before the scheduled hearings Agnes Maxie moved for partial summary judgment on the applicability of the Indian Child Welfare Act (25 U.S.C. § 1901-1923), particularly the Act's standard and burden of proof. This motion was denied on the record at the beginning of the second adoption hearing on June 18, 1981, when the court stated it would proceed under State adoption statutes. (Tr. 19) The hearing proceeded that day in Fairbanks, was recessed, and continued on June 19 in Anchorage. At the end of the hearing the court granted the adoption, ruling "the court does not find that it is in the best

interests of the child (sic) have the consent to the termination of Miss M.'s right withdrawn." This finding refers back to the State statutory authority. The court stated that in granting the adoption by the natural sister and her Native husband, the placement preferences of the Indian Child Welfare Act were being followed. (Tr. 253, 25 U.S.C. § 1915(a))

The natural mother Agnes Maxie appealed to the Supreme Court for the State of Alaska. That court issued its opinion on September 24, 1982. In its opinion it ruled that 25 U.S.C. § 1901 was applicable (App. A, infra., A-1-A-24) and remanded the case to the Superior Court for hearing pursuant to the Indian Child Welfare Act. A Petition for Rehearing was filed by the Hunters and on November 9, 1982 the Alaska Supreme Court denied the petition. (App. B, infra.,

A-25).

REASONS FOR GRANTING THE PETITION

1. The decision below conflicts with the decisions of the highest courts of other states.

The Alaska Supreme Court in its decison stated that it declined to follow In re Bertelson, 617 P.2d 121 (Mont. 1980) as Montana's interpretation was contrary to the express provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.). Further, the Alaska Supreme Court made no reference at all to the decision of the highest court of the State of Kansas in the case of In re Baby Boy L., 643 P.2d 168 (Kan. 1982). This latter decision conflicts with the Alaska decision both in principle and in fact.

In determining the applicability of the Indian Child Welfare Act to inter-family custody proceedings both Montana and Kansas

relied heavily upon congressional history. In Bertelson the court had before it a custody dispute involving the natural mother and the paternal grandparents. The grandparents were given physical custody of the child by the natural mother. Two yearr later the natural mother changed her mind and attempted to regain physical custody of the child. The trial court awarded custody to the natural mother and the grandparents appealed. The court in considering the applicability of the Indian Child Welfare Act stated:

> "As this Court held in its original opinion of June 4, 1980, the dispute does not fall within the ambit of the Indian Child Welfare Act. The Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution. The House Report sets forth the essential thrust of the act:

> '...to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by establishing minimum Federal Standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes or institutions which will reflect the unique values of Indian culture...' H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 21, reprinted in (1978) U.S. Code. Cong. & Admin. News, p. 7350. The issue here is not which foster or adoptive home or institution will best 'reflect the unique values of Indian culture...'. Rather, the present case involves an internal family dispute between the mother and the paternal grandparents over custody of the child." In re Bertelson, supra, at 125.

The court in Baby Boy L. had before it an Indian father, an unwed non-Indian mother and an Indian child of 5/16ths degree. The natural mother consented to permit non-Indians to adopt the child. The Indian father objected to the adoption and maintained that the Indian Child Welfare Act applied. The trial court rejected this

contention and granted the decree of adoption.

On appeal the Kansas Supreme Court held that the Act did not apply. In so holding the court deemed the Indian Child Welfare Act to be both complex and confusing and to apply it to the facts before it would be "inconsistent, contradictory, and would accomplish no worthwhile or useful purpose. In re Baby Boy L., supra, at 174. The court further stated:

> "The Indian Child Welfare Act, 25 U.S.C § 1901 et seq., was enacted by Congress in 1978 and in § 1902 the policy behind the adoption of the Act was expressed as:
>
> > 'The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children

> from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.' (Emphasis added by the court.)

"A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother. Section 1902 of the Act makes it clear that it is the declared policy of Congress that the Act is to adopt minimum federal standards 'for the removal of Indian children from their (Indian) families.' Numerous provisions

> of the Act support our conclusion that it was never the intent of Congress that the Act would apply to a factual situation such as is before the court.
>
> "Included in the congressional findings to support the Act is § 1901(4) to the effect 'that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them. . . .'" Id. at 175.

The court concluded that to apply the Act to the actual situation would be to violate the intent of Congress.

If Alaska was faced with the factual situation described in the Montana and Kansas cases it would hold that the Act does apply. Citing 25 U.S.C. § 1903 the Alaska court stated:

> "The language of the Act makes no reference to exceptions for custody disputes within the extended family. Nor does the Act draw a distinction based upon who the adoptive or or foster parents of the Indian child will be. In contrast, Congress explicitly excluded

> certain proceedings from the protection of the Act. In section 1903(1) the definition of 'child custody proceeding' specifically excludes custody disputes resulting from divorce proceedings between parents of an Indian child and placements of Indian children resulting from juvenile delinquency actions. It is clear, then, that there were certain internal family disputes which Confress intended to except from the provisions of the Act. These exceptions were clearly expressed and we find no compelling basis for implying any others."

Under that reasoning the Act would apply to the Montana and Kansas cases since those were neither divorce nor juvenile delinquency proceedings.

The application of the Indian Child Welfare Act to the Hunters has led to a horrifying and absurd result. Horrifying in that a three year old child who has lived with his psychological parents since birth will now live with a person who is almost a complete stranger. Absurd in that

the matter has been remanded to the trial court where the Hunters have an impossible burden if they want to retain custody of the child.

In order to prevent the child from being returned to his mother the petitioners must satisfy the court pursuant to 25 U.S.C. § 1916(a) and § 1912(d) and (f) that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family and that these efforts have proved unsuccessful." (App. A, supra, A-12) How can adoptive parents in a private adoption and with no State intervention ever be able to provide remedial services and rehabilitation programs to the natural mother. The petitioners are a housewife and an electrician and cannot cram down upon the mother "services" and "programs". The

court might as well have held that private adoptions of natives are invalid period. Application of the Act to this case requires the performance of an impossible act.

In addition to the foregoing the petitioners must prove beyond a reasonable doubt that the "continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child." (App. A, supra, A-12) If "continued" means what I think it means then petitioners must prove that the natural mother had physical custody to begin with when in fact she has never had custody. The petitioners have had custody from the day the child was born. Again, application of the Act requires the performance of an impossible act.

CONCLUSION

The question presented is one of first impression in this court. The decision of the Supreme Court of Alaska is so inconsis-

tent with the decisions of the highest courts in Montana and Kansas as to leave the intent and the meaning of the Indian Child Welfare Act in a state of confusion. It is submitted, therefore, that a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Alaska.

Dated: February 4, 1983

Respectfully submitted,

THOMAS E. FENTON
Attorney for Petitioners

(Appendices follow)

Appendix A

The Supreme Court of the State of Alaska

File No. 6200

(No. 2567--September 24, 1982)

A.B.M., Natural Mother,	)
Appellant,	)
vs.	)
M.H. & A.H., Prospective Adoptive Parents,	)
Appellees.	)

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Jay Hodges, Judge.

Appearances: Jim Kentch and Suzanne Weller, Alaska Legal Services Corporation, Anchorage, for Appellant. Thomas E. Fenton, Fairbanks, for Appellees. Niesje J. Steinkruger and D. Rebecca Snow, Assistant

Attorneys General, Juneau, for Amicus Curiae State of Alaska. Terry L. Pechota, Boulder, Colorado, for Amicus Curiae Native American Rights Fund.

Before: Rabinowitz, Connor, Matthews and Compton, Justices, and Dimond, Senior Justice.* (Burke, Chief Justice, not participating.)

DIMOND, Senior Justice.

Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 11 of the Constitution of Alaska, and Alaska R. Admin. P. 23(a).

I

On February 16, 1980, A.B.M. gave birth to a baby girl, R.H. A.B.M. was not married and had made arrangements prior to birth to give her child up for adoption to her sister and brother-in-law, M.H. and A.H. On April 9, 1980, a hearing was held before a master during which A.B.M. executed a Consent to Adoption and a Relinquishment of Parental Rights. Because an adoption questionnaire completed by the H.'s indicated that R.H. was an Indian Child, the hearing was conducted pursuant to the Indian Child Welfare Act (Act), 25 U.S.C. §§ 1901-63) (Supp. 1981). A.B.M. was advised that under the terms of the Act she could revoke her consent to the adoption at any time before the final adoption decree was entered. A hearing on the H.'s petition for adoption took place in August 1980 and a final decree of adoption was entered

by the superior court on September 5, 1980.

In November 1980 the State Department of Health and Social Services, Division of Family and Youth Services (Department) became aware of R.H.'s adoption while conducting a children's proceeding involving one of M.H.'s biological sons. The Department discovered that it had not been notified of R.H.'s adoption proceedings as required by AS 20.15.100(a)[1] and had thus been deprived of an opportunity to investigate the suitability of

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1. AS 20.15.100(a) provides in pertinent part:

> After the filing of a petition to adopt a minor, the court shall fix a time and place for hearing the petition. At least 20 days before the date of hearing, notice of the filing of the petition and of the time and place of the hearing shall be given by the petitioner to (1) the department, unless the adoption is by a stepparent of the child; . . . . The notice to the department shall be accompanied by a copy of the petition.

of R.H.'s prospective home.

As a result of the deficiency in the adoption proceedings the trial court, on motion of the State, vacated the adoption decree and ordered the Department to conduct home studies on the prospective adoptive parents and the natural mother. At the time the decree was vacated, however, the mother A.B.M., had changed her mind about consenting to the adoption. Following entry of the court's order, A.B.M. formally petitioned for return of custody of her daughter pursuant to section 1916 of the Indian Child Welfare Act.

In June 1981, hearings were conducted to determine the future custody of R.H. At the outset of these hearings, A.B.M. filed a motion for summary judgment to establish that the standards of the Indian Child Welfare Act controlled the outcome of the custody issue. The court denied the motion,

and proceeded to determine whether the adoption should be granted under state law. The court concluded that it was in the best interests of R.H. to grant the adoption by the H.'s, and refused to allow A.B.M. to withdraw her consent.

The principal issue on appeal is whether the superior court erred in not applying the provisions of the Indian Child Welfare Act to the custody proceedings. A.B.M., and the Native Rights American Fund as amicus curiae, contend that because R.H. is an Indian Child she is entitled to the procedural safeguards accorded Indian children by federal law. In response, the prospective adoptive parents, the H.'s, and the State of Alaska as amicus curiae, argue that the protections of the Act have no application to the instant case. They claim that Congress intended that the Act only

apply to custody proceedings involving the removal of Indian children from their homes by nonfamily public and private agencies, not to disputes within the extended family. In addition, the H.'s now assert that R.H. is not an Indian child as defined by the Act and should therefore be excluded from its coverage.

We reject both of these contentions for the reasons stated below, and find that the superior court was mistaken in not applying the provisions of the Indian Child Welfare Act to R.H.'s custody proceedings.

II

The legislative history of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63 (Supp. 1981) reveals that Congress was concerned with two major social goals: protecting the best interests of Indian children and promoting the stability and

security of Indian tribes and families.[2] In order to achieve these objectives the Act was created to provide "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ."[3]

The protections of the act apply to the child custody proceedings involving Indian children.[4] It is clear from the

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2. See H.R. Rep. No. 1386, 95th Cong. 2d Sess. 25-26 (1978), reprinted in 1978 U.S. Code. Cong. & Ad. News 7530.

3. 25 U.S.C. § 1902 (Supp. 1981).

4. 25 U.S.C. § 1903 provides in pertinent part:

> (1) "child custody proceeding" shall mean and include--
>
> (i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home

Congressional findings included in the Act that Congress was concerned with the alarming number of Indian families which

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(Footnote 4 continued)

> of a guardian or conservator where the parent or Indian custodian dannot have the child returned upon demand, but where parental rights have not been terminated;
>
> (ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;
>
> (iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
>
> (iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

had been broken up by the unwarranted removal of their children by nontribal public and private agencies, thereby depriving the children of exposure to cultural and social standards prevailing in Indian communities and families.[5] The prospective adoptive parents argue that because the Act was intended to remedy the agency bias that has resulted in the removal of Indian children from their cultural settings, its application is not required in the instant case. They contend that R.H.'s adoption by members of her "extended family" (M.H. and A.H.) will not deprive her of the exposure to Indian cultural or social values the Act is designed to safeguard.

We agree that the H.'s have correctly identified one of the primary

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5. See 25 U.S.C. § 1901(4)(5) (Supp. 1981).

purposes of the Act, and that application in the instant case is not required to preserve R.H.'s ties to Indian cultural or social values. Nevertheless, we cannot justify creating a judicial exception to the Act's coverage on this basis alone.[6]

The language of the Act makes no reference to exceptions for custody disputes within the extended family. Nor does the Act draw a distinction based upon who the adoptive or foster parents of the Indian child will be. In contrast, Congress explicitly excluded certain proceedings from the protection of the Act. In section

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6. We decline to follow In re Bertelson, 617 P.2d 121 (Mont. 1980), which concerned a custody dispute between the natural mother and grandparents of an Indian child. The Bertelson court categorized the conflict as "an internal family dispute" and held that the Indian Child Welfare Act was not intended to cover such proceedings. We find such interpretation contrary to express provisions of the Act.

1903(1) the definition of "child custody proceeding" specifically excludes custody disputes resulting from divorce proceedings between parents of an Indian child and placements of Indian children resulting from juvenile delinquency actions.7 It is clear, then, that there were certain internal family disputes which Congress intended to except from the provisions of the Act. These exceptions were clearly expressed and we find no compelling basis for implying any others.[8]

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7. See n. 4 supra.

8. Our position is consistent with our holding in E.A. vs. State, 623 P.2d 1110 (Alaska 1981), in which we considered the status of grandparents of Indian children who attempted to assert their right to preferential adoptive placement under 25 U.S.C. § 1915(a). Although we held that the Act did not apply because the state had started the adoptive placement before its effective date, we recognized that the Act would be applicable to any future proceedings in that case. Id. at 1215.

In support of their position the H.'s argue that the Act seeks to regulate the "removal of Indian children from their families."[9] They submit that the Act does not apply to the instant case as it instead concerns a voluntary placement within the family. This reasoning is faulty, however, since it improperly assumes that the terms "family" and "extended family" are congruent. We find no language in the Act or its legislative history to indicate that Congress accorded the word "family" anything more than its most common meaning. We are hesitant to conclude that Congress intended that the Act only apply when a child was being removed from his or her extended family in the absence of explicit language to that effect. That Congress did indeed make a distinction between

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9. 25 U.S.C. § 1902 (Supp. 1981).

family members and extended family members is borne out by section 1903(2), which defines "extended family member" for purposes of the Act.[10]

The State, as amicus curiae, argues that an absurd result will be reached if the Act is applied to A.B.M.'s case, because the H.'s qualify as "Indian custodians" within the meaning of the Act and thus would be entitled to the same procedural protections accorded to the

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10. 25 U.S.C. § 1903(2) (Supp. (1981) provides:

> "(E)xtended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

natural parents.[11] The intent of the Act was to provide procedural safeguards for the parent or person standing in the parental role and is evidenced by the fact that the language of the Act consistently refers to its provisions as being applicable to the "Indian parent or custodian" in the disjunctive.[12]

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11. 25 U.S.C. § 1903(6) provides:

> "Indian custodian" means any Indian person who has legal custody of an Indian child under the tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

The state argues that there is no evidence that the H.'s do not have legal custody by tribal custom, by state law, or by the intent of the natural mother and thus they should be regarded as the Indian custodians of A.B.M.

12. For example, 25 U.S.C. § 1912(a) provides that in any involuntary proceeding in a state court the moving party "shall notify the parent or Indian custodian and the Indian child's tribe" and § 1912(b) provides the parent or Indian custodian with court appointed counsel if indigent. (Emphasis added).

However, under the facts of this case, we conclude that the H.'s do not fall within the intended meaning of "Indian custodian". The pertinent provisions of the Act, 25 U.S.C. § 1916(a), mandates that "whenever a final decree of adoption of an Indian child has been vacated or set aside . . . a biological parent or prior Indian custodian may petition for return of custody . . . ."[13] By its terms, this provision makes it clear that the protections of the Act were not intended to apply to prospective adoptive parents against whom an adoption decree was vacated when the natural parent is seeking custody. The H.'s do not meet the requirement of being "prior Indian custodians" regardless of the manner in which the term "Indian custodian" is

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13. See secion IV of this opinion for a full discussion of 25 U.S.C. § 1916(a).

interpreted.

III

The H.'s final contention is that the Indian Child Welfare Act does not apply to R.H. because she is not an "Indian child" within the meaning of the term as used in the Act. The Act defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[14] The H.'s argue that there is nothing in the record to indicate that R.H. is a member or eligible for membership in an Indian tribe. Similarly, although it is conceded that R.H. is the biological child of A.B.M., there has been no showing that her mother is a member of an Indian tribe.

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14. 25 U.S.C. § 1903(4) (Supp. 1981).

We note, however, that in an adoption questionnaire signed by the H.'s and their attorney, the Act's definition of an Indian child was set out in full. Both adoptive parents and their attorney clearly indicated in the questionnaire that R.H. is an Indian child, that her tribal affiliation is Bethel, and that she is subject to the provisions of the Indian Child Welfare Act. Once the H.'s admitted that R.H. was an Indian child subject to the provisions of the Act, they became bound by their judicial admissions in the superior court.[15]

IV

We conclude that the superior court erred in not applying the provisions of the Indian Child Welfare Act to R.H.'s

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15. See IX J. Wigmore, Evidence § 2588, at 586 (1940); C McCormich, Law of Evidence § 262 at 630 (1972).

custody proceedings. We must still determine, however, what effect the proper application of the federal guidelines will have on R.H.'s status.

Section 1916(a) of the Act clearly applies to cases such as R.H.'s, in which a decree of adoption of an Indian child has been vacated. Section 1916(a) provides:

> (a) Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

If a biological parent petitions for return of custody -- as did A.B.M. on February 2, 1981 -- section 1916(a) mandates that the court grant the petition unless someone

challenges it and shows that the return of custody is not in the child's best interests. When there is such a challenge, the hearing to determine whether the petitioner regains custody must meet the requirements of section 1912.

Section 1912 states in pertinent part:

> (d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
>
> * * *
>
> (f) No termination of parental rights may be ordered in such a proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian

> is likely to result in serious emotional or physical damage to the child.

The determination of a child's best interests under the Act clearly differs from the analysis required by state law when a parent who has consented to an adoption seeks to regain custody of his or her child upon termination of the adoptive relationship. The Act provides that if a party wishes to defeat a biological parent's petition for return of custody, he or she must prove that such return is not in the child's best interests by showing (1) that remedial and rehabilitative programs designed to prevent the breakup of the Indian family have been implemented without success and (2) that such return of custody is likely to result in serious harm to the child. 25 U.S.C. §§ 1912, 1916 (Supp. 1981). This final element must be shown beyond a reasonable doubt and must be established by the testi-

mony of qualified expert witnesses.

In contrast, the determination of whether A.B.M. would be entitled to regain custody of R.H. under state law is governed by the standards set forth in AS 20.15.070.[16] This statute provides natural parents with an absolute right to withdraw their consent within ten days of giving consent to adoption. AS 20.15.070(b). However, if a parent at-

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16. AS 20.15.070 provides in relevant part:

> (b) A consent to adoption may be withdrawn before the entry of a decree of adoption, within 10 days, by delivering written notice to the person obtaining the consent, or after the 10-day period, if the court finds, after notice and opportunity to be heard is afforded to petitioner, the person seeking the withdrawal, and the agency placing a child for adoption, that the withdrawal is in the best interests of the person to be adopted and the court orders the withdrawal.

tempts to withdraw his or her consent after the ten day period has elapsed (as did A.B.M.), the court must hold a hearing to determine whether it is in the best interests of the child to allow the natural parent to withdraw consent.[17]

A.B.M. was not accorded a hearing meeting the requirements of the Indian Child Welfare Act. A hearing was held considering R.H.'s best interests under the test set forth by state law rather than the test of serious emotional or physical harm to the child required by section 1912(f). The superior court did not set "beyond a reasonable doubt" as the standard of proof, and

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17. Cf. S.O. vs W.S., 643 P.2d 997 (Alaska 1982). When a natural parent consents to his or her child's adoption and seeks to withdraw such consent before a final decree of adoption has been entered no parental preference is to be applied in determining whether withdrawal of the consent is in the child's best interest. Id. at 1005.

did not require testimony of qualified expert witnesses. In short, the court ignored the protections afforded to both R.H. and A.B.M. by the Indian Child Welfare Act.

We conclude that because A.B.M. petitioned for return of her child when the H.'s adoption decree was vacated, her child must be returned to her unless such an arrangement is proved to be contrary to R.H.'s best interests under the standards established by the Indian Child Welfare Act. The holding by the superior court granting the adoption of R.H. by M.H. and A.H. is therefore REVERSED. This case is REMANDED to the superior court for a hearing to determine the custody of R.H. in accordance with the Indian Child Welfare Act.

Appendix B

The Supreme Court of the State of Alaska

File No. 6200

A.B.M., Natural Mother, Appellant, vs. M.H. and A.H., Prospective Adoptive Parents, Appellees.	)

(Filed and Entered November 9, 1982)

ORDER

Before: Rabinowitz, Connor, Matthews, Compton, Justices, and Dimond, Senior Justice. (Burke, Chief Justice, not participating.)

On consideration of the petition for reharing filed September 29, 1982.

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on November 9, 1982.

CLERK OF THE SUPREME COURT

s/ Robert D. Bacon
ROBERT D. BACON

Office - Supreme Court, U.S.
FILED
APR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY HUNTER and ARTHUR HUNTER, *Petitioners,*

vs.

AGNES MAXIE, *Respondent.*

RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does the Indian Child Welfare Act 25 U.S.C. §1901 *et seq.* apply to involuntary adoption proceedings when the party seeking the termination of parental rights is a private person(s) within the extended family of the Indian child?

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JURISDICTIONAL STATEMENT

This court lacks jurisdiction to review pursuant to 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

On February 6, 1980, A.B.M., an Alaska Native, gave birth to a daughter, R.P.H. (R 5). Six days later A.B.M. gave the child to her sister M.H. and M.H.'s husband, A.H., for adoption. (R 22). A.B.M. signed a consent to adoption that was filed along with the petition (R 4). On April 9, 1980 a hearing was held in Anchorage pursuant to the Indian Child Welfare Act, 25 U.S.C. §1901 *et seq.*, (hereinafter "ICWA"), at which A.B.M. consented to the adoption and voluntarily relinquished her parental rights to the child. A decree terminating her parental rights was entered on April 23, 1980 (R 7-8). A hearing was held on the petition for adoption four months later, and an adoption decree was entered on September 5, 1980 (R 15).

In January, 1981, the Alaska Department of Health and Social Services (hereinafter "DHSS") discovered that it had not received the statutorily-required notice of the adoption petition, and moved to have the adoption proceedings reopened (R 16-18). On January 30, 1981, Superior Court Judge Jay Hodges vacated the September 5, 1980 adoption decree, reopened the adoption proceedings, and ordered that DHSS perform home studies on both the prospective adoptive parents and A.B.M. (R 12).

After A.B.M. indicated in a late January affidavit that she wanted her child back (R 22), she formally petitioned under ICWA for return of custody on February 2, 1981 (R 23). Hearings on her petition were scheduled for June, 1981.

Exhaustive and important court-ordered adoption studies on both the prospective adoptive parents and the natural mother were submitted to the court on March 27, 1981 (R 37-50). The prospective adoptive parents' study recommended that the adoption be denied; it based its conclusion on their extensive history of serious alcohol abuse and physical and emo-

tional abuse of their three sons, R (the oldest son), D1, and the youngest son, D2. A.H. and M.H. failed to provide a decent nurturing atmosphere in which a family could flourish or even survive. The study notes that M.H.'s and A.H.'s behavior had regularly required that DHSS intervene on behalf of the children since the late 1960's.

A.H. and M.H. neither tried to cooperate with DHSS's attempts to help them solve their parenting difficulties (T 111-113, 118), nor did they learn from their past failures (R 43). The H's washed their hands of their two sons when they relinquished all parental rights to them in March, 1981 (T 94).

The DHSS study of the natural mother's home described an environment very different from life with A.H. and M.H. It found the natural mother to be a good and loving parent to her three-year-old daughter, T (R 47-50) and did not find any major inadequacies in her parenting abilities.

On June 18 and 19, 1981, Judge Hodges held hearings in Fairbanks and Anchorage to determine the future custody of R.P.H. (T 16-253). At the beginning of these hearings Judge Hodges summarily denied, without oral argument, A.B.M.'s motion for partial summary judgment seeking to establish the ICWA standards as controlling (T 19). The Court did not apply the ICWA but instead decided to treat the matter as an adoption under State law (T 17-19, 89-90, 253).

Testimony at the hearings largely supported the information contained in the adoption studies.

After two days of hearings and the testimony of twelve witnesses the Superior Court orally ruled that under State law A.B.M. would not be allowed to withdraw her consent to the adoption, and the adoption petition of M.H. and A.H. would be granted (T 19, 253). A.B.M. appealed to the Alaska Supreme Court on July 20, 1981 (R 100).

That court issued its opinion on September 24, 1982. The opinion reversed the lower court, determined that the ICWA did apply and remanded the case to the Superior Court for a hearing on the return of the child pursuant to the protections afforded in the ICWA. The Hunter's petition for rehearing was denied on November 9, 1982.

SUMMARY OF ARGUMENT

The decision of the Alaska Court should not be disturbed. The decision was well reasoned and fair. There does not exist a conflict between the States concerning the application of the Indian Child Welfare Act to involuntary adoption proceedings where the parties are related private persons. The cases cited by the petitioner do not support the granting of the instant petition; they are distinguishable in law and fact from the instant case and the issue is not presently ripe for review by this court.

ARGUMENT

I. THE COURT BELOW GAVE FULL CONSIDERATION TO THE ISSUES RAISED HEREIN AND DECIDED THEM CORRECTLY.

In *A.B.M. v. M.H.*, 651 P.2d 1170 (Alaska 1982), the decision below, the Alaska Supreme Court determined that the Act applied to the custody of an Indian child in contested adoption proceedings regardless of the status of prospective adoptive parents as members of the extended family of the child, inasmuch as Congress intended no exceptions in the provisions of the Act for such disputes. *Id.* at 1173. The Act has among its purpose the protection of the stability and security of Indian Tribes and families. H.R. Rep. No. 1386 95th Cong. 2d. Sess. 25-26 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7530. In aid of this goal, certain procedural safeguards are afforded the natural parent of a child for whom an adoption decree had been vacated, including return of the child to the natural parent absent a showing beyond a reasonable doubt that to do so would not be in the best interests of the Indian child 25 U.S.C. §1916(a). The Alaska Court correctly concluded that this portion of the Act meant exactly what it said, *A.B.M., supra.* 651 P.2d 1170 at 1175, noting that the Act elsewhere makes specific distinctions between "family" and "extended family" (see 25 U.S.C. §1903(2).) *A.B.M., supra,* 651 P.2d 1170 at 1173. Any other construction of the Act would result in the

disruption of Indian families; the very evil that the Act was designed to remedy. This purpose of the Act would indeed be defeated if disgruntled family members[1] were permitted to do what governmental or private agencies cannot, bring state proceedings without regard to the preservation of cultural values the Act seeks to protect.

II. THE CASES CITED BY THE PETITIONERS ARE DISTINGUISHABLE ON THEIR FACTS FROM THE DECISION BELOW.

The petitioner has asserted that cases from the courts of Kansas and Montana conflict with *A.B.M. supra,* in their interpretation of the Act. For the reasons set forth below, the cases are readily distinguishable on their facts, and cannot, for that reason, be said to conflict.

In *Baby Boy L,* 643 P.2d 168 (Kansas 1982) the Supreme Court of Kansas determined that the ICWA did not apply to a proceeding where a non-Indian mother voluntarily placed her infant child for adoption with a specified family. Other relevant facts were that the parental rights of the putative father, an Indian, had been terminated and the child had never lived in an Indian culture. The Kansas court relied upon these facts heavily, specifically stating that a major intent of the ICWA was to maintain the integrity of relationships existing in Indian homes and

> it was not dictated that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.

Id. at 175. The court also emphasized the voluntary nature of the mother's consent and her intent to withdraw such consent if placement with the particular adoptive parents was not

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[1] In the instant case, the prospective adoptive father, Petitioner Arthur Hunter is a member of a distinctly different Native group.

accomplished. The court clearly limited its finding to the facts of this case stating: "It was never the intent of Congress that the Act would apply to a factual situation such as is before the court" and "We are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress." *Baby Boy L, supra,* 643 P.2d at 175.

The facts in the Alaska case are very different; an Indian mother has withdrawn her consent to the adoption of her Indian child. Thus the cultural values that the ICWA seeks to preserve are at issue; *Baby Boy L* does not address facts such as these and cannot be interpreted as conflicting with the Alaska decision.

In *In re Bertelson,* 617 P.2d 121 (Montana 1980) a non-Indian mother and the child's Indian paternal grandparents were engaged in a custody-visitation battle. In contrast, in *A.B.M.,* an Indian's mother desire to stop an involuntary adoption is at issue. In the former, neither party's legal rights to see or be with the child are in danger of being terminated. In *A.B.M.,* the result sought by the prospective adoptive parents would terminate the maternal rights of the mother. Further distinctions based upon the facts of *Bertelson* are difficult to draw because of the limited record from which the appeal was taken. (See Point III, *infra.)*

In summary, the *Baby Boy L* and *Bertelson* decisions are clearly based upon facts entirely distinct from those in the instant case.

III. THE RECORD ON APPEAL IN *BERTELSON* WAS INADEQUATE AND DOES NOT PRESENT A BASIS FOR COMPARISON WITH *A.B.M.*

The Montana court had at its disposal only a District Court file and the transcripts of an order to show cause hearing at which one party neither presented testimony in his behalf nor cross-examined the opposing party.

> The record before us consists solely of the District Court file (with nothing of any help to us) and the transcript of the April 30, 1979 show cause hearing held to compel the Stanleys to show cause why they should not be required to return the daughter to Irene Bertelson, the mother.

Id. at 124. The Montana court was severely hampered by the poor record and remanded the case for further proceedings.

> In reaching its decision, the trial court set forth neither the controlling facts nor how this decision was reached.
>
> Because the welfare of an innocent young child is at stake, we are concerned that a final decision of the jurisdictional questions presented be based on accurate factual information.

Id. at 124. The scant trial court record in the Montana case defeats any effort to compare the legal reasoning of the Montana and Alaska courts. (See Point IV, *infra.)*

Justice Frankfurter once observed, in commenting on the available grounds for denying certiorari in a similar situation, that this court must frequently deny certiorari if the record was inadequate even if all the jurisdictional requirements were met:

> A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.

(Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-919, 70 S. Ct. 252, 94 L. Ed. 562. (1950).) The Bertelson record below is too cloudy to provide the court with adequate basis for comparing the reasoning in *Bertelson* and that in *A.B.M.*

IV. THE KANSAS COURT'S DECISION AND THE DECISION BELOW ARE CONSISTENT IN THEIR APPLICATION OF THE GENERAL PRINCIPLES OF THE INDIAN CHILD WELFARE ACT.

In *Baby Boy L, supra,* the Kansas court drew the same conclusion as the Alaska Supreme Court, that under the ICWA the timely withdrawal of consent by a natural parent mandates the return of the child to the parent pursuant to 25 U.S.C. §1916. In discussing the application of the ICWA to the facts, the Kansas court cited 25 U.S.C. §1913 for the proposition that the lower court's denial of tribal intervention was at worst harmless error because the mother intended to withdraw her consent if placement with the chosen adoptive parents was not accomplished:

> Any attempt to effect the preferential placement contemplated by the Act would necessarily result in the removal of the baby from the custody of appellees and thereupon there being no consent by the mother to any such action, the child would be returned to her.

(Baby Boy L, 643 P.2d 168, at 177.) Clearly this assessment is not in conflict with the Alaska Supreme Court's determination that "because A.B.M. petitioned for the return of her child when the H's adoption decree was vacated, her child must be returned to her unless such an agreement is proved to be contrary to R.H.'s best interests under the standards established by the Indian Child Welfare Act." *A.B.M., supra* 651 P.2d at 1176.

V. THE MONTANA DECISION IS DISTINGUISHABLE ON ITS LEGAL THEORY

Bertelson, supra, focused on the conflict between state and tribal court jurisdiction and did not present a thorough evaluation of the legislative history of the ICWA and its interaction with state law:

> [1] Because of the paucity of the trial court record before us, and *because of the importance of this case to a claim of Indian tribal jurisdiction,* we determine that the best course of action is to remand this case to the trial court so that it can develop a complete evidentiary record and make complete findings of fact and conclusions of law.

Bertelson, supra, 617 P.2d at 124. (emphasis added)

The Alaska Supreme Court had before it, on the other hand, a complete factual record upon which a reasoned decision could be made (See Point I). In addition, the current lack of tribal courts among Alaska Native groups compelled the Alaska Court, as the available forum, to construe the statute; the *Bertelson* court issued dicta on the question of jurisdiction after remanding the case for further factual development. The two decisions cannot thus be said to conflict.

CONCLUSION

Certiorari should be denied and the Alaska decision let stand. There is no ripe issue for the court to decide since there is no clear conflict between the State's application of the ICWA to the facts as developed in the decision below. Thus there is no jurisdiction pursuant to 28 U.S.C. §1257(3).